

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of)
)
Annual Assessment of the Status of) CS Docket No. 97-141
Competition in Markets for the)
Delivery of Video Programming)

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**COMMENTS OF THE
UNITED STATES TELEPHONE ASSOCIATION**

The United States Telephone Association ("USTA") hereby files these comments in response to the Commission's Notice of Inquiry ("NOI").¹ USTA is the principal trade association for the local exchange carrier industry ("LECs").²

The Telecommunications Act of 1996 ("Act")³ envisioned LECs providing video programming competition to incumbent cable service providers. Section 651 of the Act delineates four specific means of distribution LECs were encouraged to use to provide video competition: (1) radio-based systems, (2) common carriage of video programming, (3) cable, and (4) Open Video Systems ("OVS").⁴ As described in the conference agreement, Congress

¹ *In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, Notice of Inquiry, CS Docket No. 97-141, FCC 97-194, released June 6, 1997.

² USTA members provide video programming through a number of distribution channels including cable, wireless cable and Open Video Systems.

³ *Telecommunications Act of 1996*, Pub. L. No. 104-104, 110 Stat. 56 (1996), codified at 47 U.S.C. §§151 *et seq.*

⁴ 47 U.S.C. §571 (a)(1-4).

recognized the strategic, technological and financial importance of multiple options for LECs to provide video services:

Recognizing that there can be different strategies, services and technologies for entering video markets, the conferees agree to multiple entry options to promote competition, to encourage investment in new technologies and to maximize consumer choice of services that best meet their information and entertainment needs.⁵

The decision by LECs to choose one or more options to provide video programming will depend on the business plans of each carrier, technological developments, the costs of deploying a particular video distribution system, favorable regulatory climate, access to programming, and the availability of capital. The Commission, and other federal and state agencies involved with regulating video programming distribution, must create the type of regulatory environment consistent with the intent of the Act for vigorous competition to ensure the appropriate financial commitments from LECs to provide video programming competition. A number of obstacles must be overcome before competition will develop in the video programming marketplace. USTA's comments will address a number of proceedings which are currently forestalling the growth of video competition that Congress intended consumers would benefit from in a competitive marketplace. Specifically, USTA's comments will focus on the following issues raised in the Commission's NOI: (1) regulatory and judicial developments that affect use of

⁵ See *Telecommunications Act of 1996*, Senate Report No. 104-230, Conference Agreement at 172.

different technologies,⁶ (2) developments in program access,⁷ and (3) the status of OVS deployment (“OVS”).⁸

REGULATORY AND JUDICIAL UNCERTAINTY ADVERSELY IMPACT VIDEO COMPETITION

The Commission has issued Orders on OVS and local multipoint distribution services (“LMDS”) which are currently on appeal.⁹ In the OVS appeal, municipalities, and the National Cable Television Association (“NCTA”) are appealing the Commission’s Order that established regulations to foster local video competition. Localities and supporting trade associations are raising constitutional arguments in opposition to the Commission’s authority to limit the imposition of fees and preempt restrictions on access to public rights-of-ways.¹⁰ If these appeals are successful, localities would treat OVS like cable systems subject to local franchise authority.

NCTA requests the Court to overturn the Commission’s regulations that cable systems

⁶ *NOI* at 4, ¶6.

⁷ *Id.* at 10-11, ¶14.

⁸ *Id.* at 13, ¶20.

⁹ *See In the Matter of Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems, Second Report & Order & Third Report and Order and Second Order on Reconsideration*, CS Docket No. 96-46 (August 8, 1996), *appeal filed, City of Dallas v. FCC*, Case No. 96-60502 (5th Cir. July 30, 1996); *In the Matter of Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission’s Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, Second Report and Order, on Reconsideration, and Fifth Notice of Proposed Rulemaking*, CC Docket No. 92-297 (March 13, 1997), *appeal filed, United States Telephone Association v. FCC*, Case No. 97-1368 (D.C. Cir. May 20, 1997).

¹⁰ *See, e.g., Brief of Petitioners City of Dallas and the United States Conference of Mayors* (February 26, 1997).

are restricted from access to OVS to ensure an opportunity for OVS systems to competitively challenge incumbent cable systems.¹¹ OVS, however, was intended by Congress to be subject to streamlined regulations to encourage the development of OVS as a competitive alternative to cable systems.¹² Congress, in recognizing that telephone companies were logical and potentially formidable sources of such competition, systematically set about eliminating regulatory barriers including franchise requirements imposed by state and local governments that would impede telephone companies' ability to compete.¹³ Accordingly, adoption of streamlined regulations was intended to support the growth and development of competition, whereby OVS would become a viable option for consumers. The legislative history supports the Commission's efforts to create the regulatory climate necessary for OVS to become a competitive option to incumbent in-region cable providers. As Congress stated:

There are several reasons for streamlining the regulatory obligations of such systems. First, the conferees hope that this approach will encourage common carriers to deploy open video systems and introduce vigorous competition in entertainment and information markets. Second, the conferees recognize that common carrier that deploy open systems will be "new" entrants in established markets and deserve lighter regulatory burdens to level the playing field. Third, the development of competition and the operation of market forces mean that government oversight and

¹¹ See *Brief of Petitioner National Cable Television Association* (February 26, 1997).

¹² 47 U.S.C. §573(c).

¹³ See *Brief of Intervenors Bell Atlantic Telephone Companies and Bell Atlantic Video Services Company, BellSouth Telecommunications, Inc., GTE Service Corporation and United States Telephone Association* in Support of Respondent FCC at 25 (May 13, 1997).

regulation can and should be reduced.¹⁴

The absence of a decision in the OVS appeal creates regulatory uncertainty. Without final resolution of pending appeals, LECs must carefully weigh the business case for OVS deployment.

Equally important for LECs in assessing the risks/rewards of OVS as a competitive option is the Commission's decision on cost allocation for video programming.¹⁵ The Commission has yet to issue a decision more than a year after comments were filed. In referring to filings made in the cost allocation docket, USTA stated in the 1996 review of video competition "onerous cost allocation rules and exogenous price-cap adjustments that penalize investments in broadband facilities will destroy LEC interest in deploying video programming through OVS."¹⁶ Commission delay in releasing an Order on cost allocation, when coupled with appeals of the Commission's OVS Order, creates a climate of doubt regarding the viability of OVS as an option for LECs to use in providing video competition to incumbent cable providers.

With respect to LMDS, the Commission's Order prevents LECs from even competing in future auctions for the largest block of spectrum to provide video competition in-region.¹⁷ The

¹⁴ See *Telecommunications Act of 1996*, Senate Report No. 104-230, Conference Agreement at 178.

¹⁵ *In the Matter of Allocation of Costs Associated with Local Exchange Carrier Provisions of Video Programming Services*, Notice of Proposed Rulemaking, CC Docket No. 96-112 released May 10, 1996.

¹⁶ USTA Reply Comments, CS Docket No. 96-133 at 6, n.16 (August 19, 1996), citing USTA Cost Allocation Comments at 2 (May 31, 1996); USTA's Cost Allocation Reply Comments at 14 (June 12, 1996) and numerous *ex parte* filings.

¹⁷ *In the Matter of Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz*

Commission's eligibility restrictions are inconsistent with the Commission's prior decisions in favor of open eligibility in awarding licenses,¹⁸ and the pro-competitive, deregulatory requirements of the Act.¹⁹ Congress clearly intended that LECs would use LMDS as an entry option in providing video competition. The Commission's current prohibitions on LECs bidding on LMDS spectrum in-region discourages LECs from making a business case for deploying video programming through LMDS.

While Commission Orders on video programming are appealed, the Copyright Office has undertaken a comprehensive review of the compulsory license regime, including the application of the cable compulsory license to OVS, and potentially other new video technologies.²⁰ In testimony and comments filed in the proceeding, USTA urged the Copyright Office to apply its regulations in a manner that is competitively neutral to competing providers of video programming to promote equal access to programming necessary for the development of competition among rival multichannel video programming distributors ("MVPDs").²¹ The

Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, Second Report and Order on Reconsideration, and Fifth Notice of Proposed Rulemaking, CC Docket No. 92-297 (March 13, 1997).

¹⁸ USTA Comments at 2-3, CC Docket No. 92-297 (August 12, 1996) citing decisions of the Commission to adopt open eligibility for awarding Multichannel Multipoint Distribution Services, General Wireless Communications Service, and Mobile Satellite Service licenses.

¹⁹ USTA Comments at 5 (August 12, 1996)

²⁰ *See Revision of the Cable and Satellite Compulsory Licenses*, Docket No. 97-1, 62 Fed. Reg. 13396-13400 (March 20, 1997).

²¹ Testimony of USTA (April 28, 1997); Reply Comments of USTA (June 18, 1997).

Copyright Office is expected to release its report to Congress on August 1, 1997. The findings and recommendations in the Copyright Office report, and potential legislative and regulatory changes regarding compulsory licensing of video programming, will greatly affect the growth and development of competition.

The outcome of these proceedings will have an impact on the scope of video competition. These unresolved issues, however, make it difficult for LECs to strategically select options to provide video programming.

PROGRAM ACCESS FOR LECs REMAINS AN ONGOING CONCERN

The Commission's program access rules "are intended to ensure access by non-cable MVPDs to satellite delivered programming produced by companies affiliated with cable operators...."²² The Commission's recent decision in favor of Bell Atlantic Video Service Company ("BVS") is illustrative of the problems faced by competitors in gaining access to programming required to vigorously compete in the video programming marketplace.

The Commission's Order found that BVS was being denied programming for its OVS in Dover Township, New Jersey in violation of the program access rules.²³ As the Commission noted, these rules are necessary to develop video competition:

The program access provisions were designed to ensure that competition to cable develops and to encourage nascent

²² NOI at 10, ¶14.

²³ *In the Matter of Bell Atlantic Video Services Company v. Rainbow Programming Holdings, Inc. and Cablevision Systems Corporation*, Program Access Complaint Pursuant to 47 C.F.R. §76.1002, CSR-4983-P, *Memorandum Opinion and Order* (July 11, 1997).

competition from emerging competitors. In addition, through the Telecommunications Act of 1996, Congress sought to encourage telephone companies ... to enter the video distribution business and thereby provide competition to traditional cable operators. In its open video system rulemaking proceeding ..., the Commission recognized that access to video programming is a prerequisite to open video system operators' ability to compete with cable providers.²⁴

The Commission must continue to promote equal access to programming for OVS providers and other MVPD providers of video programming and vigorously enforce its program access rules. Without equal access to video programming, competition from incumbent cable providers will not develop. In a step towards more effective enforcement of the Commission's program access rules, USTA urges the Commission to act swiftly on Ameritech's Petition for Rulemaking.²⁵ Ameritech's Petition seeks expeditious resolution of program access complaints, a limited right to discovery enabling complainants to prove their cases, and the imposition of damages and or fines to serve as a disincentive to violators in the first instance.

**OPEN VIDEO SYSTEM DEPLOYMENT
WILL DEPEND ON THE BUSINESS
CASE THAT FAVORS ITS USE**

The Commission requests comments on the plans of LECs and others to deploy OVS.²⁶ Deployment of OVS will depend upon a business case being made by LECs considering multiple

²⁴ *Id.* at 7-8, ¶16.

²⁵ *In the Matter of Petition for Rulemaking of Ameritech New Media, Inc. to Amend 47 C.F.R. §76.1003- Procedures for Adjudicating Program Access Complaints*, RM-9097 (May 16, 1997).

²⁶ *Id.* at 13, ¶20.

options available to provide video programming competition. Current legal and regulatory obstacles discussed earlier in these comments establish the difficulty of successfully deploying OVS.

CONCLUSION

The outcome of a number of pending judicial and regulatory proceedings involving OVS, LMDS, cost allocation for video programming, and copyright compulsory licensing will play a large role in how video competition develops. Moreover, access to programming will impact the viability of competition. USTA urges the Commission to issue an Order on cost allocation for video programming that makes deployment of broadband networks for video programming and telephony economically sound, and to act expeditiously to more effectively enforce the Commission's program access rules.

Respectfully submitted,

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